IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARGARET WALLACE	:	CIVIL ACTION
	:	
v.	:	05-4204
	:	
FEDERATED DEPARTMENT STORES, INC. et al.	:	

MEMORANDUM AND ORDER

JOYNER, J. **June 7, 2006**

Via the motion now pending before this Court, Defendants, Federated Department Stores, Inc., and the individually named defendants ("Defendants"), move to dismiss Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(6).[1] For the reasons outlined below, the motion shall be granted.

Factual Background

Plaintiff Margaret Wallace brings suit pursuant to 42 U.S.C. §§ 1983, 1985, and 1986. Plaintiff alleges that she was unlawfully terminated from her employment at the Macy's store at Lehigh Valley Mall in Allentown, Pennsylvania ("Macy's Lehigh Valley"). Plaintiff began her temporary, seasonal employment

[1]Plaintiff argues that the motion to dismiss was not filed on behalf of all named defendants, and that a default judgment is therefore warranted. All of the named defendants are represented by the same counsel. The only 'defendants' not specifically identified in the motion were "Male and Female Security Persons, Presently Unidentified," "Pat, Clerk #236904 (from receipt)," and "Other Parties Unknown." No default judgment will be entered against parties that are not identified or are only minimally identified, particularly where no motion for default has been filed pursuant to Federal Rule of Civil Procedure 55.

with Macy's Lehigh Valley in January 2005. Employees at Macy's Lehigh Valley are issued a discount card that is good for a twenty percent discount on Macy's purchases. In addition to this discount card, Plaintiff was given a Macy's gift card by her daughter.

In January 2005, Plaintiff purchased a sweater at Macy's, using her discount card to get the twenty percent discount. Plaintiff later realized that the sweater contained wool. Because Plaintiff cannot wear wool, she returned the sweater to Macy's some time before the end of January 2005. Plaintiff alleges that when she returned the sweater, the clerk (or the computer) processing the return mistakenly applied a $1.70 credit to Plaintiff's Macy's gift card. According to Plaintiff, the $1.70 represents the twenty percent of the sweater's price that was deducted from Plaintiff's original purchase because of her employee discount card. Plaintiff alleges that the credit should have been made to her Macy's discount card, and that she was unaware of any error because her role was merely that of a customer.

Plaintiff's temporary employment ended some time before the end of January 2005. In March 2005, Plaintiff applied for and was awarded a non-seasonal sales associate position at Macy's Lehigh Valley. On March 31, 2005, Plaintiff alleges that Macy's Lehigh Valley employees confronted her regarding the $1.70

credit. It is not entirely clear from the facts set forth in Plaintiff's Complaint what caused the credit to become an issue that time. Plaintiff alleges that Macy's Lehigh Valley management and security staff accused her of retail theft based on the fact that she had received a credit for the full price of the returned sweater, rather than the price minus the employee discount.[2]

Plaintiff alleges that she was interrogated by security staff without representation by counsel, forced to sign papers "under duress," subjected to false charges, and unlawfully terminated. Plaintiff further asserts that her rights were

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[2]This allegation as to the basis for the retail theft accusation is not supported by the copies receipts attached to the Complaint. The receipts indicate that Plaintiff purchased a sweater for $8.41 on January 1, 2005, and charged that purchase, along with another sweater, to her Macy's credit card. (Pl.'s Compl. Exs.) On January 4, 2005, a $55.00 gift card was purchased. (Id.) Plaintiff then returned the $8.41 sweater on January 8, 2005. (Id.) The return is marked on the credit card purchase receipt, but the only receipt attached showing a credit of $8.41 is a credit to the gift card purchased January 4. (Id.) That credit was applied, and $10.11 was charged for another sweater against the gift card, such that the actual amount subtracted from the gift card was only $1.70. (Id.) The gift card's balance at the conclusion of the January 8 transaction was $53.30. (Id.) This indicates that there was not a credit of $1.70, but rather that this amount was paid from the gift card to cover the difference between the returned sweater and the purchased sweater. (Id.) Plaintiff then returned the $10.11 sweater, and that amount was credited back to the gift card, bringing the gift card balance to $63.41. (Id.) Thus, the amount at issue is actually $8.41 – the difference between the amount for which the card was purchased and the ending balance of the card on the last receipt included with the Complaint. (See id.) The $1.70 was entirely unrelated to the employee discount, contrary to Plaintiff's apparent understanding of the facts.

violated when the store manager, and subsequently the regional Director of Employee Relations and Administration, refused to provide information and copies of documents related to Plaintiff's termination. Plaintiff seeks to recover a total of three million dollars (approximately $150,000.00 from each defendant) for the alleged violations of her civil rights.

Standards Governing Rule 12(b)(6) Motions to Dismiss

Generally speaking, in considering motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the district courts must "accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom." Allah v. Seiverling, 229 F.3d 220, 223 (3d Cir. 2000)(internal quotations omitted). See also Ford v. Schering-Plough Corp., 145 F.3d 601, 604 (3d Cir. 1998). A motion to dismiss may only be granted where the allegations fail to state any claim upon which relief may be granted. See, Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997). Where the plaintiff is a pro se litigant, the Court is obliged to construe the complaint liberally in the plaintiff's favor. See Haines v. Kerner, 404 U.S. 519, 520-521, 30 L. Ed. 2d 652, 92 S. Ct. 594(1972).

The inquiry is not whether plaintiffs will ultimately prevail in a trial on the merits, but whether they should be afforded an opportunity to offer evidence in support of their claims. In re Rockefeller Center Properties, Inc., 311 F.3d 198,

215 (3d Cir. 2002). Dismissal is warranted only "if it is certain that no relief can be granted under any set of facts which could be proved." Klein v. General Nutrition Companies, Inc., 186 F.3d 338, 342 (3d Cir. 1999)(internal quotations omitted). It should be noted that courts are not required to credit bald assertions or legal conclusions improperly alleged in the complaint and legal conclusions draped in the guise of factual allegations may not benefit from the presumption of truthfulness. In re Rockefeller, 311 F.3d at 216. A court may, however, look beyond the complaint to extrinsic documents when the plaintiff's claims are based on those documents. GSC Partners, CDO Fund v. Washington, 368 F.3d 228, 236 (3d Cir. 2004); In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1426. See also, Angstadt v. Midd-West School District, 377 F.3d 338, 342 (3d Cir. 2004).

Discussion

Plaintiff initiated the instant suit to recover for alleged discriminatory treatment by her former employer and a number of individual employees. Plaintiff attempts to set forth claims for relief pursuant to 42 U.S.C. §§ 1983, 1985, and 1986. Plaintiff also suggests that she may, at some later time, seek relief under 42 U.S.C. § 1981.[3] Defendants seek dismissal on the basis that

[3]Plaintiff acknowledges that she cannot pursue a Title VII claim because she did not exhaust the administrative remedies necessary for recovery under that statute. (Pl.'s Compl. at 1.)

Plaintiff has failed to state any claim for which relief may be granted.

§ 1983

To state a viable claim pursuant to § 1983, a plaintiff must show that a person (or persons) acting under color of state law deprived her of a right conferred by the Constitution or federal law. See 42 U.S.C. § 1983. Defendants argue that Plaintiff cannot state a claim for relief under § 1983 because none of those she alleges to have violated her rights were acting under color of state law.

In a case involving private parties, a plaintiff may show the requisite state action by establishing that "the conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the State." Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982). Determining whether actions are can fairly be attributed to the state requires consideration of two factors:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the state is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted

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Plaintiff later suggests in her Complaint that some cause of action pursuant to Title VII might accrue. (Pl.'s Compl. at 4, 20.) Given that Plaintiff is no longer an employee of any of the Defendants, and that all deadlines for pursuing such a claim through the required administrative process have admittedly lapsed, no claim based on the prior employment relationship can arise under Title VII.

> together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Id.

Plaintiff argues that, by virtue of the state laws licensing private security officers, Macy's security personnel were acting under color of state law. (Pl.'s Pet. in Opp. to Def.'s Mot. to Dismiss Compl. with Prejudice ("Pl.'s Resp.") at 10-13.) The Commonwealth of Pennsylvania licenses private detectives pursuant to the Pennsylvania Private Detective Act of 1953, 22 Pa. Stat. Ann. § 11 et seq. The mere licensing of detectives or security officers is generally insufficient to place the actions of such individuals under the color of state law. See Gipson v. Supermarkets Gen'l Corp., 564 F. Supp. 50, 55 n.3 (D.N.J. 1983) (citations omitted). If that were the case, every attorney (not to mention every state-licensed driver, realtor, and funeral director), would be acting under color of state law every time he or she engaged in the licensed activity. Thus, courts have distinguished acting under state license from acting under state law. See id. (interpreting Weyandt v. Mason's Stores, Inc., 279 F. Supp. 283, 287 n.3 (W.D. Pa. 1968)). In doing so, courts have treated private detective licensing laws differently than statutes that specifically confer the power to effect a legal arrest. See id. (noting that the Weyandt court distinguished a detective licensed under Pennsylvania Private Detective Act of

1953 from one empowered by the Professional Thieves Act of 1939 to make an arrest). Thus, the store security staff – whether directly employed by Macy's or employed through a security contractor – are not state actors by virtue of their state licensing requirements.

Plaintiff does not directly present an argument for state action based on Macy's apparent invocation of the Pennsylvania Retail Theft Act, but such an argument would fail even if made. The Third Circuit has determined that the conduct of a store and its employees cannot properly be attributed to the state unless the store has a pre-arranged with police under which the police will "arrest anyone identified as a shoplifter by the store without independently evaluating the presence of probable cause." Cruz v. Donnelly, 727 F.2d 79, 81 (3d Cir. 1984). The Pennsylvania Retail Theft Act codifies the common-law 'shopkeeper's privilege' by allowing a merchant or his employee "who has probable cause to believe that retail theft has occurred" to detain the suspect "in a reasonable manner for a reasonable time" to determine whether such theft has occurred and, if it so, to then inform a peace officer. 18 Pa. Cons. Stat. Ann. § 3929(d); see also Lynch v. Hunter, Civ. A. No. 00-1331, 2000 U.S. Dist. LEXIS 13248, * 22-23 (E.D. Pa. Sept. 1, 2000). Pennsylvania and federal courts hold that store employees – including security officers – are not acting under color of

state law by detaining a suspected shoplifter pursuant to the Pennsylvania Retail Theft Act. See id.; Vassallo v. Clover, Div. of Strawbridge & Clothier, 767 F. Supp. 651, 652-53 (E.D. Pa. 1990). Thus, detention pursuant to the Pennsylvania Retail Theft Act is not considered either to be state action itself or to indicate a pre-arranged plan as required under Cruz. Lynch, 2000 U.S. Dist. LEXIS at * 22-23.

Plaintiff cannot show that any of the defendants acted under color of state law or in concert with a state actor. Absent such a showing, Plaintiff cannot successfully state a claim for relief pursuant to § 1983.

§ 1985

Defendant argues that Plaintiff's § 1985 conspiracy claim must fail because § 1985 cannot provide a remedy for violations of Title VII. Defendant suggests that, because Plaintiff's claim is essentially one of race-based employment discrimination, it is properly the subject of a Title VII suit and, therefore, cannot give rise to a § 1985 claim.[4]

The Supreme Court has held that the "deprivation of a right created by Title VII cannot be the basis for a cause of action under § 1985(3)." Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 378 (1979) (superceded by statute on other

[4]This is not to say that Plaintiff can state a valid claim for relief under Title VII. See supra n.3.

grounds). Thus, to the extent that Plaintiff's § 1985 claim relies on a violation of Title VII, it cannot survive.[5]

Plaintiff's Complaint, however, arguably suggests additional violations that might be the basis of a § 1985 claim.[6] We examine whether any of Plaintiff's allegations sufficiently state a violation of federal rights that can support such a claim.

Plaintiff alleges that she was subject to interrogation

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[5]Plaintiff does not specify which subsection of § 1985 is the basis of her claim, but quotes from both § 1985(2) and (3). These subsections, to the extent they address conspiracies to deprive have been found to require substantially similar elements. See, e.g., Brawer v. Horowitz, 535 F.2d 830, 840 (3d Cir. 1976). Thus, we find no reason to treat these two sections differently for the purpose of determining whether claims under either may be premised on a Title VII violation.

[6]Plaintiff mentions the possibility of pursuing a § 1981 claim. The law is unsettled as to whether violations of § 1981 could properly give rise to a § 1985 claim. The Third Circuit has declined to address whether a § 1985 claim can properly rely on the alleged deprivation of rights guaranteed by § 1981. See Brown v. Philip Morris, Inc., 250 F.3d 789, 806 (3d Cir. 2001) (noting that the question of whether alleged violation of § 1981 can be the basis of a § 1985 claim need not be addressed because plaintiffs failed to articulate a 1981 claim). Interpretation of the dicta of Brown has varied among district courts and judges in the Third Circuit. Compare Gonzalez v. Comcast Corp., Civ. A. No. 03-445, 2004 U.S. Dist. LEXIS 14989, *16 (D. Del. July 30, 2004) (citing Dixon v. Boscov's, Inc., Civ. A. No. 02-1222, 2002 U.S. Dist. LEXIS 13815, *2 (E. D. Pa. July 17, 2002) for proposition that the Third Circuit's decision in Brown compels the conclusion "that statutory rights pursuant to section 1981 cannot be the basis of a section 1985 remedy") with Abdulhay v. Bethlehem Med. Arts, L.P., Civ. A. No. 03-04347, 2004 U.S. Dist. LEXIS 5494 (D. Pa. 2004) (determining that "the weight of persuasive authority from both the United States Supreme Court and the Third Circuit permits a Section 1981 or 1982 claim to be the basis for a Section 1985(3) claim"). We need not, however, resolve that question at this time, since Plaintiff has not actually asserted a § 1981 claim.

without being "appraised of her Rights" or provided with counsel, and was forced to sign papers "under duress." (Pl.'s Compl. at 14.) This suggests that Plaintiff attempts to allege a violation of her Fourth Amendment rights. Violations of the Fourth Amendment protection against unreasonable search and seizure, as applied to the states via the Fourteenth Amendment, might be a basis for a § 1985 claim. Plaintiff, however, cannot properly plead a search and seizure violation under the Fourth and Fourteenth Amendments protects against unreasonable searches and seizures only when conducted by the government or its agents. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 613 (1989). As established above in our disposition of Plaintiff's claim pursuant to § 1983, none of the Defendants acted under color of state law or as agents of the state in any fashion. See supra, p. 6-9.

Plaintiff's allegations with regard to the failure of Macy's personnel to forward "evidence" as requested are insufficient to support a § 1985 claim. This appears to be an attempt to make a claim for violation of due process.[7] The alleged actions simply

[7]Even if Plaintiff properly plead a due process violation, it is uncertain whether such a claim is sufficient to form the basis of a viable § 1985 claim. Compare Dunn v. New Jersey Transit Corp., 681 F. Supp. 246, 251 (D.N.J. 1987) (noting that § 1985(3) "does not provide a remedy for a conspiracy to deny the right to due process, as opposed to the right to equal protection under the law") with Fralin v. County of Bucks, 296 F. Supp. 2d 609, 614-15 (E.D. Pa. 2003) (silent as to whether due process violations give rise to a § 1985 claim, but dismissing on other

are not violations of Plaintiff's due process rights. Violations of due process require action by the state, or interference by a private party that prevents the state from adhering to the due process of law. See, e.g., Lugar, 457 U.S. at 937. As discussed above with regards to Plaintiff's § 1983 claims, there has been no state action here, nor any action in concert with the state. See supra, p.6-9. The actions (or failures to act) alleged are, in essence, an allegation that Defendants refused to participate in discovery or fact-finding in the absence of a legal or administrative complaint. These actions of Plaintiff's private employer and its agents cannot be said to have interfered with the exercise of due process, because the notice pleading standard set forth by Federal Rule of Civil Procedure 8 does not require extensive investigation and exchange of information prior to the filing of a suit in federal court. See Fed. R. Civ. P. 8. Plaintiff's rights to conduct discovery pursuant to the Federal Rules of Civil Procedure did not accrue until after the filing of her suit and the completion of the prerequisites of Federal Rule of Civil Procedure 16. See Fed. R. Civ. P. 16(f).

Similarly, Plaintiff cannot rely on a due process violation in the termination of her employment to support her § 1985 claim. Plaintiff cannot make such a showing because constitutional protections for employment are generally limited to public

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grounds).

employees, and Macy's is a private employer.[8] See generally Nicholas v. Pa. State. Univ., 227 F.3d 133 (3d Cir. 2000).

To the extent that any of Plaintiff's allegations seek redress through § 1985 based on the Fourteenth Amendment's equal protection provisions, such claims must also fail.

§ 1986

Section 1986 is a derivative of § 1985 and, as such, a claim for relief under § 1986 requires a violation of § 1985. Therefore, if the "claimant does not set forth a cause of action under the latter, its claim under the former necessarily must fail also." Rogin v. Bensalem Twp., 616 F.2d 680, 696 (3d Cir. 1980). Because Plaintiff failed to state any valid claims under § 1985, Plaintiff's § 1986 claim cannot survive.

Conclusion

For the reasons set forth above, Plaintiff has failed to state a claim for which relief can be granted, and amendment would be futile. Thus, Defendants' Motion to Dismiss is GRANTED and Plaintiff's Complaint is DISMISSED with prejudice.

[8]Even if Plaintiff had a constitutionally protected interest in her employment, it is not clear that this would give rise to a cognizable § 1985 claim. See supra n. 7.

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ORDER

AND NOW, this 7th day of June, 2006, upon consideration of Defendant's Motion to Dismiss With Prejudice Plaintiff's Complaint, it is hereby ORDERED that the motion is GRANTED and Plaintiff's Complaint is DISMISSED with prejudice for the reasons set forth in the preceding Memorandum Opinion.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.